IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-208

EWALD B. NYQUIST, Commissioner of Education of the State of New York, and NEW YORK STATE HIGHER EDUCATION SERVICES CORPORATION,

Appellants,

against

JEAN-MARIE MAUCLET,

Appellee.

EWALD B. NYQUIST, Commissioner of Education of the State of New York, THE UNIVERSITY OF THE STATE OF NEW YORK, THE BOARD OF REGENTS OF THE STATE OF NEW YORK, THE NEW YORK HIGHER EDUCATION ASSISTANCE CORPORATION, WILLARD C. ALLIS, DR. ERNEST BOYER, DR. JUDAH CAHN, WILMOT R. CRAIG, THOMAS P. DENN, WALTER A. KASSENBROCK, NORMA KERSHAW, REV. LAURENCE J. MCGINLEY, S. J., WILLIAM G. MORTON and RUSSEL N. SERVICE, being the members of the board of directors of said corporation, and THE NEW YORK STATE HIGHER EDUCATION SERVICES CORPORATION,

Appellants,

against

ALAN RABINOVITCH,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURTS FOR THE WESTERN AND EASTERN DISTRICTS OF NEW YORK

BRIEF FOR APPELLANTS

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BRIEF FOR APPELLANTS

Ewald B. Nyquist, Commissioner of Education of the State of New York, the above-named public officials, agencies and corporations ("appellants") appeal from a judgment of the United States District Courts for the

Western and Eastern Districts of New York (statutory three-judge court), dated March 26, 1976. The judgment declares New York Education Law § 661(3) invalid under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and permanently enjoins its enforcement. The statute authorizes state financial assistance for higher education for qualified citizens and aliens who have applied for citizenship, who would apply if not disabled from doing so and who are paroled refugees.

Opinions Below

The opinion of the three-judge district court (A. 96-102•), dated February 11, 1976, is reported at 406 F. Supp. 1233.

The decision and order of the single district judge in support of the convening of a three-judge court in *Mauclet* v. *Nyquist, et ano.* (A. 11-12), dated May 22, 1975, is unreported.

The memorandum and order of the single district judge in support of the convening of a three-judge court in *Rabinovitch* v. *Nyquist, et al.* (A. 39-44), dated May 23, 1975, is unreported.••

Jurisdiction

The jurisdiction of this Court is conferred by 28 U.S.C. § 1253.

The judgment of the three-judge district court (A. 106-107) was filed on March 29, 1976.•••

• References prefixed by the letter "A" refer to the Appendix filed on this appeal.

•• Additional defendants in both cases are not indicated hereafter.

••• A judgment in *Mauclet* v. *Nyquist*, prepared by the Clerk of the United States District Court for the Western District of New York, was filed on February 11, 1976 (A. 2, 103). The March 29 judgment carries the captions of both actions and is signed by the members of the three-judge court (A. 106-107). It was filed in the United States District Court for the Eastern District of New York where the three-judge court was convened (A. 6).

Appellants' Notice of Appeal from the March 29 judgment (A. 108-109) was filed on May 28, 1976.• The jurisdictional statement was filed on August 11, 1976. Probable jurisdiction was noted on November 1, 1976.

Questions Presented

1. Should New York Education Law § 661(3) be reviewed under a strict equal protection test because it excludes some alien students from state financial assistance for higher education?

2. Is the denial of state financial assistance to aliens who refuse naturalization under § 661(3) reasonably or substantially related to New York's interests in distinguishing those students who are the proper objects of its public funds from those who are not and to its interests in expanding its political community and educating its electorate?

3. Does appellee Rabinovitch have standing to challenge § 661(3) insofar as it pertains to student loans as distinguished from awards although he has not applied for a loan and had he applied, it might have been denied on an alternative ground?

State Statute Involved

New York Education Law § 661, as amended by L. 1975, c. 663, § 1, effective July 1, 1975, states in part:

> *"Eligibility requirements and conditions governing awards and loans*
>
> • • •

• Appellant Nyquist filed a Notice of Appeal from the Western District judgment in *Mauclet* v. *Nyquist* on March 12, 1976 (A. 2, 104-105). Appellee Rabinovitch has filed a cross-appeal to this Court from the March 29 judgment insofar as it denies him damages equal to the financial assistance he alleges he would have received but for his refusal to apply for United States citizenship. *Rabinovitch* v. *Nyquist, et al.*, Doc. No. 75-1809.

3. Citizenship. An applicant (a) must be a citizen of the United States, or (b) must have made application to become a citizen, or (c) if not qualified for citizenship, must submit a statement affirming intent to apply for United States citizenship as soon as he has the qualifications, and must apply as soon as eligible for citizenship, or (d) must be an individual of a class of refugees paroled by the attorney general of the United States under his parole authority pertaining to the admission of aliens to the United States."

Statement of the Case

Appellees Mauclet and Rabinovitch are permanent resident aliens (A. 8, 19, 97). Appellee Mauclet is a French citizen and was a graduate student at the State University of New York at Buffalo on the date of the judgment below (A. 8, 97, 106). He filed a timely application for a tuition assistance award ("TAP") for the academic year 1974-1975. The application was denied under Education Law § 661(3) because of appellee's failure to provide the State Education Department with proof of the filing of a petition for naturalization (A. 8-9, 97). Appellee Mauclet has lived in New York State since April 1969, is married to an American citizen and the father of a child of that marriage (A. 8). He "intends to reside permanently in the United States . . . [but] does not wish to relinquish his French citizenship at this time." A. 8-9.

Appellee Rabinovitch is a Canadian citizen (A. 20, 57) and an undergraduate student at Brooklyn College in New York City (A. 19, 56). In April 1973, he was advised by the State Board of Regents that he had qualified for a Regents college scholarship on the basis of his performance on a competitive examination (A. 18, 57, 98). He was provided with the appropriate forms for the scholarship and for TAP together with an application for United States

citizenship. He refused to complete the citizenship application and was disqualified under Education Law § 661(3). A. 19, 25, 55-56, 62, 98. Although appellee Rabinovitch has never applied for a state student loan (A. 73), he believes he may need such loans in the future and that he will be disqualified under Education Law § 661(3). A. 57, 71, 98-99. Appellee has lived in New York State since 1964 (A. 19, 56, 98). He "intends to continue to reside in the United States and in New York State." A. 57. He "intends to retain his Canadian citizenship and does not intend to seek naturalization as an American citizen." *Ibid.*

Appellees brought separate actions for declaratory and injunctive relief against Education Law § 661(3). *Mauclet* v. *Nyquist* was commenced in the Western District of New York. The complaint alleges that § 661(3) is unconstitutional under the Equal Protection Clause and in conflict with a federal constitutional and statutory plan regulating immigration and naturalization (A. 9, 11). *Rabinovitch* v. *Nyquist* was commenced in the Eastern District of New York. The amended complaint alleges the same grounds for invalidating § 661(3) (A. 58, 59) and, in addition, claims a due process violation on the theory that statute is supported by conclusive presumptions not necessarily or universally true in fact (A. 58). Appellee Rabinovitch also claimed damages equal to the amount he would have received from a Regents college scholarship and TAP for the academic years 1973-74 and 1974-75 (A. 60) and sought a class action order (A. 15-16).

The single district judge in both cases held that appellees' constitutional claims were sufficient to vest the courts with subject matter jurisdiction under 28 U.S.C. § 1343(3) and to warrant the convening of a three-judge court (A. 11-12, 40-44). The *Rabinovitch* motion for a class action order was denied (A. 44) as was appellees' motion to dismiss the *Mauclet* complaint (A. 11).

The cases were heard together (A. 45, 97). Appellants moved for dismissal or summary judgment (A. 78).* Both appellees moved for summary judgment (A. 47, 62). The affidavits in support of appellees' motions generally parallel the allegations of the amended complaints (A. 49-51, 68-71).**

The affidavit of Jean-Marie Mauclet adds the fact that he received a state student loan for the 1974-75 academic year in apparent conflict with Education Law § 661 (A. 50-51).*** Appellee also adds that he would have been denied a State University (tuition assistance) scholarship for 1974-75 because of his ineligibility for TAP (A. 50). However, no conflict with § 661(3) is presented with respect to the 1974-75 loan. Appellee does not state, and the record does not otherwise establish, what appellee told the lender concerning his citizenship status. Nor would appellee have been denied a State University (tuition assistance) scholarship on the ground alleged since such scholarships are not limited to TAP recipients. State University of New York State, *University Scholarship Administrative Policies*, Item 058.

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* Appellants contended in part that appellee Rabinovitch lacked standing to challenge Education Law § 661(3) insofar as it pertained to the state student loan program (A. 98-99). The issue was raised again in appellants' jurisdictional statement, pp. 4, 11, and is briefed herein at Point II. The legislative history of the student loan program and its related citizenship and national affinity requirements (pp. 16-17) and arguments sustaining those requirements under the Equal Protection Clause (pp. 18-24) are presented for completeness. They are not intended to suggest waiver or abandonment of appellants' jurisdictional objection to the adjudication of the constitutionality of Education Law § 661(3) in relation to student loans.

** Both complaints were amended (A. 47-48, 52-62) before the three-judge court to add the New York State Higher Education Services Corporation as a defendant (A. 97 n. 2). The amended complaint in *Rabinovitch* also deletes former class action allegations and makes minor additions and revisions to the factual allegations (A. 53-57).

*** Appellee Mauclet did not allege either a present need for a loan or the filing of a new application (A. 50-51).

The affidavit of Alan Rabinovitch adds that because of his disqualification from state financial assistance, he is required to attend "a public college within New York City" and to "live in [his] parents' home." A. 70-71. Appellee does not disparage the quality of the education he is receiving in "any way." A. 70.

The three-judge court limited its consideration of Education Law § 661(3) to appellees' equal protection claims (A. 101). Although both citizens and aliens may obtain financial assistance under § 661(3), the court applied the strict equal protection test stating that the classification was "based solely on alienage" (A. 99) and therefore "'*subject to close judicial scrutiny.*'" *Ibid.* quoting *Graham* v. *Richardson*, 403 U.S. 365, 372 (1971). (Emphasis added by the three-judge court.)

New York's interest in limiting gifts for educational purposes to aliens who are willing to make an affirmative political commitment to the United States and to the state was rejected as a restatement of special public interest doctrine held insufficient in *Graham* v. *Richardson, supra* at 374 (A. 100). The state interest "in an educated electorate fully able to participate in community political life" advanced by the statute (A. 100) did not justify the exclusion of aliens who refused to accept the responsibilities of citizenship because the excluded aliens "pay taxes, register with the Selective Service, and 'contribute in myriad other ways to our society.'" A. 101, quoting *In re Griffiths*, 417 U.S. 717, 722 (1973). The court added that it did not find either interest "compelling" in any event (A. 101).

Appellee Rabinovitch was allowed standing to challenge § 661(3) insofar as it regulated student loans (A. 98-99). His claim for damages was denied on the authority of *Edelman* v. *Jordan*, 415 U.S. 651 (1974). A. 101-102.

New York Student Grant and Loan Programs: Citizenship and National Affinity Requirements

New York provides financial assistance to students for higher education through competitive, academic performance awards, non-competitive general awards, both grants, and student loans. New York Education Law, Arts. 13 and 14, §§ 604, 605, 667-669, 670-674 and 680-684 (McKinney's Supp. 1975), added by L. 1974, c. 942, § 16, effective July 1, 1975. The cost of the program was $145,766,000 in fiscal 1975-76.*

There are two minimum eligibility requirements regardless of the type of assistance sought, citizenship or national affinity [Education Law § 661(3)] and state residence [Education Law § 661(5)]. Under § 661(3), an applicant "(a) must be a citizen of the United States, or (b) must have made application to become a citizen, or (c) if not qualified for citizenship, must submit a statement affirming his intent to apply . . . as soon as he has the qualifications, and must apply as soon as eligible, or (d) must be an individual of a class of refugees paroled by the attorney general of the United States . . . ."** One academic or calendar year of student residence is generally required. § 661(5)(a) and (b). Current legal residence is sufficient

* Of this amount, $111.4 million was expended for tuition assistance ("TAP") general awards, $24.9 million for competitive awards (scholarships) and the balance for interest and defaults on guaranteed loans.

** Clause "(d)" was added by L. 1975, c. 663, § 1, effective July 1, 1975. It is intended to allow paroled refugees greater flexibility in meeting eligibility requirements so that they may obtain education and retraining without regard to delays in the adjustment of their immigration status. Letter from J. W. Mirandon, President of the New York State Higher Education Services Corporation to Judah Gribbitz, Counsel to the Governor, dated July 22, 1975, included in Bill Jacket for L. 1975, c. 663; Memorandum of Assemblyman George A. Cincotta, 1974 N.Y.S. Legislative Annual 171. See 8 U.S.C. §§ 1182 (d)(5) and 1153 (a)(7).

for certain general awards. Education Law §§ 668 (awards for children of deceased and disabled war veterans), 669 (awards for children of deceased correction officers and civilian employees of correctional facilities). See also Education Law § 674 (competitive awards for veterans with war service—residence at time of entry into service and at time of award).

Awards may be used at approved institutions within the state and for instruction given outside the state under the auspices of in-state institutions. Education Law § 661 (4)(a). Loans may be used at any college or vocational school that conforms with regulations. Education Law §§ 661, 680.

The Legislature centralized the administration of awards and loans in the New York State Higher Education Services Corporation ("NYSHESC") in 1974 in its last major revision and recodification of Articles 13 and 14. L. 1974 c. 942, § 16, effective July 1, 1975.* The citizenship and national affinity requirements now in § 661(3) were applied to both awards and loans at that time. *Ibid.* However, citizenship and national affinity requirements had been adopted for each assistance program prior to their centralization in NYSHESC.

Academic Performance Awards:

Regents College Scholarships

Regents college scholarships were the first financial assistance program for New York students pursuing higher education. L. 1913, c. 292, § 1, adding §§ 70-77 to the Education Law of 1909, as amended, effective August 1, 1913. Scholarships are awarded to students completing high school programs on the basis of competitive examina-

* Start-up provisions (§§ 651, 652, 654, 657 and 660) for the corporation were effective on June 14, 1974. L. 1974, c. 942, § 35(2). Corporate powers became effective on July 1, 1975. L. 1974, c. 942, § 35(3).

tion. Education Law § 605(1) (McKinney's Supp. 1975).* With minor exceptions that insure distribution throughout the state, they are allocated by county in the same ratio as the number of graduating students in the county bears to number of graduating students in the state. Education Law § 605(1)(a) and (b). Current law provides for the award of 18,843 scholarships. Education Law § 670(1). Each scholarship entitles the recipient to $250 annually commencing with the 1974-1975 academic year. Education Law § 670(b).

Citizenship was first codified as a requirement for Regents college scholarships by L. 1920, c. 502, § 1, effective May 4, 1920.** The eligible class was expanded in 1957 to include "minors and natural children of parents, at least one of whom is a citizen," L. 1957, c. 756, § 4, effective July 1, 1957, and in 1959, to include, in addition, minors and natural children of parents "at least one of whom has duly declared intention of becoming . . . [a] citizen in accordance with law." L. 1959, c. 479, § 1, effective July 1, 1959.***

Statutory citizenship and national affinity requirements were deleted by L. 1961, c. 391, § 2, effective April 1, 1961, and reference to the pertinent Regents Rule required in-

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* There are five additional competitive awards: Regents professional education in nursing scholarship [Education Law §§ 605 (a), 671], Regents professional education in medicine or dentistry scholarships [§§ 605(3), 672], Regents physician shortage scholarships [§§605(4); 673], Regents war veteran scholarships [§§ 605 (5), 674], and Regents Cornell University scholarships [§ 605(6)].

** An oath of allegiance to the United States and the State of New York was required of scholarship recipients as early as 1917. Minutes of the Board of Regents for July 19, 1917, adding § 568 to ch. XIV of the Regents Rules.

*** The 1957 and 1959 amendments referred to § 604(3) of the Education Law of 1947, as amended. The 1947 Law, as amended, was repealed by L. 1969, c. 1154, effective July 1, 1969.

stead.* The change from statute to administrative rule was intended to provide a "uniform" requirement for all scholarships. State Education Department Memorandum, McKinney's Laws of 1961, p. 1964.** The "Regents Rule" that met the need created by L. 1961, c. 391, § 2, required citizenship or the filing of an application for citizenship. Minors were relieved of the requirement if they filed a statement of intent to apply when reaching 18 years of age. Failure to make application at that time was grounds for revocation of the scholarship. 8 NYCRR § 145.4 (March 29, 1962).

Section 145.4 remained the governing requirment until 1969 when it was repealed following the enactment of L. 1969, c. 1154, § 3 effective July 1, 1969. *** It was amended in 1968 to include all individuals under disabilities rather than minors alone. 8 NYCRR § 145.4, effective November 6, 1968.

In addition to the change from statutory to administrative regulation of citizenship and affinity requirements for scholarships just described, the 1961 legislation effected major revisions in state financial assistance to students for higher education. L. 1961, cc. 388-394. Scholar incentives, now tuition assistance (TAP), were established; Regents Scholarships were increased; amounts that could be loaned or guaranteed on behalf of a student were in-

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* All 1961 amendments appear in McKinney's Education Law §§ 601-2100 (main volume).

** At the time of the enactment of L. 1961, c. 391, § 2, the Commissioner of Education administered 12 separate scholarship programs.

*** L. 1969, c. 1154, §§ 1, 3, repealed Article 13 of the Education Law of 1947, as amended, and added a new Article 13 governing competitive and non-competitive awards. Statutory citizenship and national affinity requirements were restored as § 602 of the Article. The text of L. 1969, c. 1154, does not appear in the current McKinney's Education Law §§ 601-2100.

creased, and the students' obligations to pay interest and repay principal were eased. See Governor's Message, McKinney's Laws of 1961, pp. 2183-84, 2105-2106. The Legislature enacted findings, purposes and objectives with respect to the award of regents scolarships and scholar incentives at that time, stating in part (L. 1961, c. 389, § 1*):

• • •

"(a) Individual self-realization and development depends importantly on the availability of opportunities for not only the specially talented but for all who have the desire and capacity for higher education. The future progress of the state and nation and the general welfare of the people depend upon the individual development of the maximum number of citizens to provide the broad range of leadership, inventive genius, and source of economic and cultural growth for oncoming generations.

"In a world of unmatched scientific progress and technological advance, as well as of unparalleled danger to human freedom, learning has never been more crucial to man's safety, progress and individual fulfillment. In the state and nation higher education no longer is a luxury; it is a necessity for strength, fulfillment and survival.

"(b) Those who complete undergraduate training will be the teachers, doctors, engineers, scientists and other leaders in every aspect of economic, political and cultural life of tomorrow. They will be in the forefront of free men seeking to meet the challenge posed by those who would crush and subvert human freedom and democratic government.

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* The text of §1 is reprinted in the Historical Note preceding § 601 of McKinney's Education Law §§ 601-2100 (main volume).

"(c) • • • It is in the vital interest of all the people of the state to develop fully this reservoir of talent and future leadership [by providing more extensive and increased awards]."

Statutory citizenship and affinity requirements were restored by L. 1969, c. 1154, § 3, Art. 13, § 602(2).* Section 602(2) defined three classes of eligibles: citizens, applicants for citizenship, and persons who, if not qualified for citizenship, affirmed their intent to apply as soon as qualified and did apply.** The 1969 text was incorporated verbatim in the 1974 legislative revisions, L. 1974, c. 942, § 16, effective July 1, 1975, and renumbered § 661(3). The text has continued down to date with the addition of clause "(d)," L. 1975, c. 663, effective July 1, 1975, extending eligibility to paroled refugees. See second footnote, p. 8.

General Awards: TAP

Non-competitive, general awards, known initially as scholar incentives, now tuition assistance ("TAP"), were added to the state program by L. 1961, c. 389, § 4, effective April 11, 1961, adding § 601-a to the Education Law of 1947, as amended.

TAP awards are available to all undergraduate students (for up to 5 years of study) and graduate students (for up to 4 years of study) who meet the basic eligibility requirements of Education Law § 661(3), (5) (McKinney's Supp. 1975) and who demonstrate the ability to complete

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* L. 1969, c. 1154, §§ 1 and 3, respectively repealed Article 13 of the Education Law of 1947, as amended, and added a new Article 13.

** As is apparent, the substance of the governing "Regents Rule" during the period 1961-69 was adopted. 8 NYCRR § 145.4, repealed effective July 22, 1969.

their courses. Education Law §§ 604(1), 667(1)(2).* Awards cannot be made unless tuition exceeds $200 annually, cannot exceed tuition, and cannot duplicate other benefits except in limited circumstances. Education Law § 667(1), (3)(c), (4)(2)(a), (b). No award can be made if student and/or parental income exceeds $20,000 annually. Education Law § 667(3)(b), (4)(2)(c). Within these parameters, graduate students and undergraduate students who were enrolled prior to the 1978-1979 academic year generally receive from $100 to $600 annually depending upon their financial circumstances. Education Law § 667 (3)(b). Undergraduate students who enroll for the 1978-1979 academic year or thereafter will generally receive from $100 to $1500 annually depending on their financial circumstances. Education Law § 667(4)(1).

Scholar incentive and TAP awards were increased on two occasions, particularly for less affluent students. See memoranda of Governors Rockefeller and Wilson in support of L. 1969, c. 1154, McKinney's Laws of 1969, p. 2588, and L. 1974, c. 942, McKinney's Laws of 1974, p. 2117, respectively. However, the legislation's original purpose of providing a limited financial incentive to a large class of individuals continues.**

> "[T]he program will serve as an incentive for students to proceed with their college course . . . [and will also] generate in the minds of many students in high school, knowing that there is some provision for them if they are able to complete high school, a desire

* There are two additional non-competitive awards: Regents awards for children of deceased and disabled veterans [Education Law §§ 604(1), 668] and Regents awards for children of deceased state correction officers and civilian employees of correctional facilities [§§ 604(3), 669].

** One hundred and twenty-two thousand awards were contemplated under the original enactment. Governor's message on approving L. 1961, cc. 388-394, McKinney's Laws of 1961, p. 2105.

> to make a greater effort to do so. * * * [T]he amount of money which will be available for each student is not great measured by the present costs of college education but a great many of the students, with this start, will be able to obtain other help. [*]

TAP awards did not initially carry statutory citizenship of national affinity requirements although the legislative findings, purposes and objectives expressly applicable to the program established the appropriateness of such requirements. L. 1961, c. 389, § 1. See discussion, pp. 12-13. However, the statutory citizenship and affinity requirements for Regents college scholarships were repealed in favor of a uniform administrative rule simultaneously with the enactment of the TAP program, L. 1961, c. 391, § 2, and it was the Legislature's apparent belief that appropriate requirements for both programs would be established administratively. See pp. 10-11. This view is supported by the Governor's message approving L. 1961, cc. 388-394, which states in part (McKinney's Laws of 1961, p. 2106): "Both in the method of qualifying for assistance and in administrative detail, the Scholar Incentive Program [TAP] follows the well-established principles of the Regents College Scholarship Program." Citizenship and affinity requirements were by then an integral part of the scholarship program. However, the Board or Regents and the Commissioner of Education did not promulgate a pertinent rule or regulation for TAP as distinguished from Regents scholarships. See 8 NYCRR § 145.4, repealed effective July 22, 1969, and discussion, pp. 10-11, 13.

Statutory citizenship and national affinity requirements for TAP were enacted by L. 1969, c. 1154, § 3, adding Art. 13, § 602(2), to conform with the scholarship program requirements. Joint Legislative Committee to Revise and

[*] Memorandum of the State Education Department in support of L. 1961, c. 389, McKinney's Laws of 1961, pp. 1963-64.

Simplify the Education Law, Higher Education Staff Report No. 9, p. 3 (April 23, 1969). As noted, the statutory requirements assumed their present form [except for clause "(d)"] with the enactment of § 602(2) of Chapter 1154.

Student Loans

The student loan program was established in 1957 under the auspices of the New York Higher Education Assistance Corporation ("NYHEAC"). L. 1957, c. 367, effective April 11, 1957, adding Article 14 to the Education Law of 1947, as amended.*

Loans are guaranteed by the corporation, now NYSHESC. They are available to assist students attending or planning to attend college or vocational school who meet the basic eligibility requirements of Education Law § 661(3), (5). Education Law § 680 (1)(a), (b) (McKinney's Supp. 1975).** The lender generally receives a maximum of 7% interest. Education Law § 680(1). NYSHESC *Handbook on Scholarships, Grants and Student Loans* p. 27 (rev. 12/75) (hereafter "Handbook p. "). A borrower with an adjusted family income between $0-$15,000 is generally entitled to an interest-free grace period until at least nine months after he completes or terminates his course of study. Education Law § 682(2)(3).**

Current statutory provisions governing amounts, interest rates, and maximum repayment periods [Education Law §§ 680 (1), 682(1), 683(1)] are tied directly to the requirements of the Federal Guaranteed Student Loan

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* NYHEAC was superseded by NYSHESC on July 1, 1975. L. 1974, c. 942, § 16.

** There has not been any in-state limitation. See Education Law § 651 (main volume), added by L. 1957, c. 367, § 1.

*** Borrowers with adjusted family incomes between $15,000 and $30,000 pay interest at the rate of 3% during the grace period. Borrowers with adjusted family incomes over $30,000 pay the full 7%. Handbook, p. 27.

Program, Title IV, Part B of the Higher Education Act of 1965, as amended, 20 U.S.C. §§ 1071-1087-2, 45 C.F.R. Part 177 (1975 ed.). New York's participation in program has enabled it to obtain a partial ($15-$30,000, adjusted family income) or complete ($0-$15,000, adjusted family income) federal contribution for interest on college loans payable during grace periods and 70% of the cost of defaults.* The state absorbs all grace period interest costs not payable by the borrower for vocational school loans as well as the cost of defaults on those loans.

Citizenship or national affinity has been required for student loans since the inception of the program in 1957. Affidavit of J. Wilmer Mirandon, former President of NYHEAC, sworn to July 15, 1975 (A. 82). Applicants were required to be citizens, nationals, or aliens willing to declare their intent to become citizens as soon as possible. Student's Application for Loan Guarantee, Exhibit "B" to Rabinovitch Complaint (A. 26). The requirements for competitive and non-competitive awards established by L. 1969, c. 1154, § 3, adding Art. 13, § 602(2), were extended to student loans by L. 1974, c. 942, § 16, effective July 1, 1975, when the three financial assistance programs were centralized under the jurisdiction of NYSHESC.

Summary of Argument

Citizens and aliens "who are most like" them, *Mathews* v. *Diaz*, —— U.S. —, 96 S. Ct. 1883, 1893 (1976), receive state grants and loans for higher education under Education Law § 661(3). In designating these individuals as the objects of its bounty, New York advances its substantial interests in preserving and strengthening its political community. The alien resident is encouraged to full participation and the quality of the citizenry, both present and

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* The federal expenditure for New York was $67,208,000 in fiscal 1975-76.

future, is enhanced. Although not subject to strict scrutiny because of the inclusion of both citizens and aliens in the benefited class, § 661(3) is nonetheless precisely drawn to effectuate these interests. Only the permanent resident alien who has refused the opportunity to participate fully in the political life of the state and nation is excluded.

POINT I

Education Law § 661(3) does not violate the equal protection clause because it excludes some aliens from state grants and loans for higher education. The citizens and aliens who receive the benefit of the statute advance New York's interests in strengthening its political community and in easing the adjustment of refugees. Although properly reviewed under the traditional equal protection test, Section 661(3) survives strict scrutiny because the state interests are substantial and the classification is precise.

A. The traditional equal protection test requiring a showing of only a reasonable relation to a legitimate state interest is applicable to Education Law § 661(3).

Both citizens and designated classes of aliens obtain competitive and non-competitive grants and loans for higher education under Education Law § 661(3). Aliens willing to apply for citizenship, either at the time they seek financial assistance [§ 661(3)(b)] or when relieved of a disability that precludes naturalization [§ 661(3)(c)], and paroled refugees [§ 661(3)(d)] are eligible. Only permanent resident aliens who refuse naturalization are ineligible. The resulting classification for purposes of equal protection analysis is one based on degree of national affinity, not one "based on alienage." Cf. *Graham* v. *Richardson,* 403 U.S. 365, 372 (1971). See *Friedler* v. *University of New York,* 70 Misc. 2d 446, 333 N.Y.S. 2d 928, 931-32 (Sup. Ct. Erie Co.), holding that Education § 602(3), now § 661(3), did not deny benefits because of alienage and

sustaining the statute under the traditional equal protection test.

The benefited class consists of citizens who necessarily have a complete identification with the United States and "those who are most like citizens" although retaining alien status. *Mathews* v. *Diaz,* —— U.S. —— 96 S. Ct. 1883, 1893 (1976). The alien who states his intention to become naturalized [§ 661(3)(b), (c)] is like the citizen in that he will shed his allegiance to the country of his nationality and attain the same level and quality of identification with this nation as the citizen. See *Harisiades* v. *Shaughnessy,* 342 U.S. 580, 585-86 (1952); *Foley* v. *Connelie,* 419 F. Supp. 889, 898 (S.D.N.Y. 1976) (three-judge court), Jurisdictional Statement filed December 14, 1976. The alien refugee [§ 661(3)(d)] seeks a haven from persecution "on account of race, religion or political opinion" or is "uprooted by catastrophic natural calamity." 8 U.S.C. § 1153(a)(7). *Mathews* v. *Diaz, supra* at 1892; *Rosenberg* v. *Yee Chien Woo,* 402 U.S. 49, 52-53, 55-57 (1971). See Gordon & Rosenfeld, *Immigration Law & Procedure* §§ 2.3i, pp. 2-23—2-23.2, 2.27h (1976 rev. ed) (hereafter "Gordon & Rosenfeld §—, p. —"). The United States has traditionally offered a "humane response" to his plight. *Mathews* v. *Diaz, supra; Rosenberg* v. *Yee Chien Woo, supra.* See *Gordon & Rosenfeld* § 2.3i, pp. 2-23-2-24.2. He is like the citizen in that he depends upon the protection of the same government. Absent that protection, the refugee is literally "homeless," and often stateless. *Rosenberg* v. *Yee Chien Woo, supra* at 52.

Both categories of aliens are unlike the permanent resident who is excluded by § 661(3). The excluded alien has chosen to retain his primary allegiance to the country of his nationality and may seek its protection. *Harisiades* v. *Shaughnessy, supra.* See Harper, *Immigration Laws of the United States,* Part VII, § 1(a), p. 567 (3 ed. 1975).

The traditional equal protection test is applicable to Education Law § 661(3) given that the statute distinguishes

only within the "heterogeneous" class of aliens in the manner just described and does not distinguish between citizens and aliens *vel non.* See *Mathews* v. *Diaz, supra* at 1891, 1892-93. Therein, a Medicare statute, 42 U.S.C. § 1395o(2)(B), authorizing benefits for citizens and aliens with five years permanent residence was reviewed. This Court held that the only question presented was "whether the statutory discrimination *within* the class of aliens—allowing benefits to some aliens but not to others—is permissible," *Id.,* at 1892. (Emphasis original.) The Court then applied Fifth Amendment analogue of the reasonable relation test and sustained the statute. *Id.,* at 1892-93. The instant classification is distinguishable from that involved in *Mathews* v. *Diaz, supra,* only insofar as the benefits authorized by Education Law § 661(3) are provided free (competitive and non-competitive awards), or at minimal cost (student loans), to more aliens.*

Even if Education Law § 661(3) is viewed as establishing a classification "based on alienage," *Graham* v. *Richardson, supra,* the traditional reasonable relation test continues to apply. Narrowly drawn classifications in aid of a state's power to define and preserve its political community are excepted from strict scrutiny notwithstanding their necessary discriminatory effect on aliens. *Sugarman* v. *Dougall,* 413 U.S. 634, 642-643, 647-649 (1973). See *Dunn* v. *Blumstein,* 405 U.S. 330, 344 (1972). Education Law § 661(3) is such a classification. The Legislature has expressly referred to the state's survival as a political entity and to the continuing need for citizen leaders in supporting grants for higher education. L. 1961, c. 389, § 1(a)(b) and (c).** The numerical strength of the electorate and its educational level, interests advanced by § 661(3), are similarly tied to the state's power to define and preserve its political community. See discussion, pp. 12-13.

* Individuals insured under the Medicare Part B program pay half the cost of their premiums. 42 U.S.C. § 1395r(b) (1972 ed. and Supp. IV). *Mathews* v. *Diaz, supra* at 1886 n.1. Education Law § 661(3) does not distinguish between permanent residents and non-immigrant aliens. 8 U.S.C. § 1101(a)(15), (20).

** Subsidized student loans serve the same need.

Additionally, Education Law § 661(3) effects a purely beneficial result and may be excepted from strict scrutiny for this reason alone. The statutes invalidated in this Court's recent decisions involving classifications based on alienage denied aliens' access to the necessities of life, if they became indigent, *Graham* v. *Richardson, supra,* and foreclosed public and private occupations. *Hampton* v. *Mow Sun Wong,* —— U.S. ——, 96 S. Ct. 1895 (1976) (federal civil service); *Sugarman* v. *Dougall, supra* (state civil service); *Examining Board of Engineers, Architects and Surveyors* v. *deOtero,* —— U.S. ——, 96 S. Ct. 2264 (1976) (engineering); *In re Griffiths,* 413 U.S. 717 (1973) (practice of law). See also *Truax* v. *Raich,* 239 U.S. 33 (1915).

Education Law § 661(3) imposes no such denial of access or foreclosure of the means of earning a livelihood. The excluded alien may attend a public or private university in New York at the same tuition rate as the citizen. He is simply not provided with a state subsidized grant or loan in addition. See *Spatt* v. *New York,* 361 F. Supp. 1048, 1053-56 (E.D.N.Y. 1973), aff'd 414 U.S. 1058 (1973), applying reasonable relation test to in-state limitation on use of Regents college scholarships and sustaining limitation. See also *C.D.R. Enterprises* v. *Board of Education of the City of New York,* 412 F. Supp. 1164, 1174-1178 (E.D.N.Y. 1976) (three-judge court, PLATT, D.J., dissenting), Jurisdictional Statement filed June 15, 1976.

If Education Law § 661(3) is closely scrutinized, the inquiry is limited to whether or not the state has shown that its interest in the statute is "both constitutionally permissible and substantial, and that its nse of the classification is 'necessary . . . to the accomplishment' of its purposes on the safeguarding of its interest." *In re*

Griffiths, supra at 721-722 (footnotes omitted). *Examining Board of Engineers, Architects and Surveyors* v. *de-Otero, supra* at 2281; *Sugarman* v. *Dougall, supra* at 642. The state interests advanced by the statute need not be compelling. Compare opinion of the district court, A. 101.

B. State grants and loans for higher education provided for citizens and aliens under Education Law § 661(3) advance New York's interests in strengthening its political community and in easing the adjustment of refugees. The statute's exclusion of permanent resident aliens who refuse naturalization from benefits is both reasonably and precisely related to these state interests.

New York has a vital interest in the definition and preservation of its political community. *Sugarman* v. *Dougall, supra* at 642-643, 647-649. *Dunn* v. *Blumstein, supra* at 344. Its interest in this regard is not merely permissible or substantial but a "matter resting firmly within . . . [its] constitutional prerogatives." *Sugarman* v. *Dougall, supra* at 648. Thus, the state may attempt to expand its electorate by offering incentives to aliens to become naturalized. See *Hampton* v. *Mow Sun Wong, supra* at 1906. It may seek to improve the quality of its citizenry, both present and future, by subsidizing higher education. See *Spatt* v. *New York, supra.* In sum, the state may seek complete political participation from all who reside within its borders to the extent of their individual capacities.

Education Law § 661(3)(a), (b) and (c) bear directly on these interests. Citizens [§ 661(3)(a)] and aliens willing to become citizens [§ 661(3)(b), (c)] receive state subsidies for higher education.* The alien class as so defined has

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* Although state loans unlike awards, or grants, must be repaid, they share some of the same characteristicts. To the extent that state student loans are available under more favorable terms and conditions than commercial loans, the borrower receives a subsidy like the grantee.

received the benefit of State scholarships since 1962, of state loans since 1957 and of TAP awards since 1969. Its inclusion in the programs resulted from deliberate legislative and administrative action in fulfillment of the state interests just described. See discussion, pp. 10-11, 12-13, 15-16, 17.

The Legislature itself expressly identified its support of competitive and non-competitive awards with the preservation of the state's political community, citing *inter alia,* New York's need for a "maximum number" of citizen leaders, and the relationship between the availability of higher education and the "strength" and "survival" of the state and nation as a "democratic" community of "free men". L. 1961, c. 389, § 1(a) and (b) quoted in part at pp. 12-13. The particular citizenship and national affinity requirements adopted in each program themselves demonstrate a concern for attracting new citizens by affording educational opportunities in the immediate interest of the alien and the ultimate interest of the state and nation. See discussion, pp. 10-11, 15-16, 17. *Friedler* v. *University of New York, supra* at 931-932.

The exclusion of the permanent resident alien who refuses naturalization from state grants and loans as a result of Education Law § 661(3) is both reasonable and precise in light of the established nexus between the benefits provided and New York's political interests. As noted, the excluded alien eschews the very identification with the state and the United States which the programs seek to engender. See discussion, pp. 19-20. Although he may contribute to society in "myriad" "ways", *In re Griffiths, supra* at 722, he does not make a contribution consistent with this statutory plan.

Conversely, the inclusion of the paroled refugee absent an express statement of his intent to become a citizen [§ 661(3)(d)] does not affect the validity of the overall

classification. The refugee is more like the citizen than the permanent resident alien who refuses naturalization and thus the distinction drawn between those two classes of aliens is perforce reasonable. See discussion, pp. 19-20, 21. That the parolee's inclusion does not immediately advance the political interests served by § 661(3)(a), (b) and (c) does not imply that no legitimate or substantial state interests are served or that such interests as may be served are inconsistent with ones previously described. The United States and the State of New York has historically offered a "humane response" to the plight of the refugee. See discussion, p. 19. The need for such a response is strengthened by the refugee's status as a parolee because he must await Congressional legislation to adjust his status to immigrant. Compare 8 U.S.C. § 1153(a)(7) (conditional entrant may adjust his status to immigrant after 2 years of continuous physical presence) with § 1182(d)(5) (no parallel provision for parolees). Section 661(3)(d) thus assists the parolee in continuing his education and in obtaining retraining to make his skills more marketable between the time he arrives in New York until he knows, with a reasonable degree of certainty, that he will be able to stay.

Education Law § 661(3) may be sustained even without regard to the specific political and humane interests it reflects. The "conscientious sovereign" may share its bounty with its "own citizens and *some* of its guests." *Mathews* v. *Diaz, supra* at 1891 (Emphasis original). It is not compelled to choose between providing benefits for all citizens and all aliens or no benefits at all. Its decision in this regard may rely solely on the character of the relationship between the alien and his country. "[A]s the alien's tie grows stronger, so does his claim to an equal share" of public benefits. *Mathews* v. *Diaz, supra* at 1891-92. Section 661(3) parallels the *Diaz* formulation exactly and must therefore be sustained. State grants and loans are

provided according to degree of national affinity. "[C]itizens and those who are most like citizens qualify. Those who are less like citizens do not." *Diaz* v. *Mathews, supra* at 1893.

POINT II

Appellee Rabinovitch lacked standing to contest the constitutionality of Education Law § 661(3) insofar as it pertains to state student loans. Appellee did not apply for a loan and both his need for a loan and the anticipated basis of its denial were speculative.

The jurisdiction of a federal district court can be invoked only by a plaintiff who has suffered "some threatened or actual injury resulting from . . . putatively illegal action." *Warth* v. *Seldin,* 422 U.S. 490, 499 (1975), quoting *Linda R.S.* v. *Richard D.,* 410 U.S. 614, 617 (1973). This "personal stake" must be sufficient to justify the exercise of the court's remedial powers. *Warth* v. *Seldin, supra* at 498; *Baker* v. *Carr,* 369 U.S. 186, 204 (1962). Absent this degree of realistic interest, there is no case or controversy within the meaning of Article III of the Federal Constitution. *O'Shea* v. *Littleton,* 414 U.S. 448 (1974).

Plainly, the Article III requirement is not satisfied by a complaint about a practice that has not occasioned the individual plaintiff any injury. *Rizzo* v. *Goode,* —— U.S. —— 44 U.S.L.W. 4095, 4098 (Jan. 21, 1976). Appellee Rabinovitch is in exactly this position with respect to his challenge to Education Law § 661(3) insofar as defines the class of individuals eligible for state student loans. Appellee had not applied for a loan at the time he commenced his action (A. 73), and he did not apply during the course of the proceedings. See *Mathews* v. *Diaz, supra* at 1887 n. 3, 1889, adjudicating claim based on denial of benefits after action was commenced but refusing to consider claims of purported class members "who will be" denied benefits in the

future on the ground that no action had been taken that was tantamount to a denial.

Appellee did not even allege a present need for a loan. He stated only (A. 71): "I believe I may require student loans to help cover the cost of my education." A. 71. The fact that his then current financial circumstances and those of his parents were described in response to interrogatories from NYEAC (A. 74-77) did not establish a present injury. His financial circumstances and/or those of his parents could change by the time the need for a loan actually arose. In light of these considerations, appellee's claim against the citizenship and national affinity requirements for student loans was not ripe when it was adjudicated by the district court. See *Warth* v. *Seldin, supra* at 499.

The Assistant Attorney General was correct in advising the district court that appellee would be denied a loan if he refused to state his intent to become a citizen at the time of his application (A. 98). However, it is equally correct that appellee would be denied a loan if he failed to meet any of the need or responsibility requirements. See generally Student's Application for Loan Guarantee Exhibit "B" to *Rabinovitch* complaint, A. 26-29. Given this range of possibilities, a basis for rejecting appellee as a loan applicant cannot be established in advance of the actual determination. Thus, in adjudicating this claim against Education Law § 661(3), the district court assumed hypothetical facts and "anticipated a question of constitutional law in advance of the necessity of deciding it." *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 346-347 (1936).

Eisenstadt v. *Baird*, 405 U.S. 438 (1972), and *Barrows* v. *Jackson*, 346 U.S. 249 (1953) are not opposed. Regardless of the derivative source of their constitutional claims, plaintiffs in both cases suffered actual injury. Eisenstadt was arrested, and the sale of Barrows' house was jeopardized.

CONCLUSION

For the foregoing reasons the judgment of the District Court should be reversed and Education Law § 661(3)(a), (b) and (c) declared valid under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

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January 3, 1977

Respectfully submitted,

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